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IN THE

Supreme Court of the United States

October Term, 1949

No. 645

THE PENNSYLVANIA RAILROAD COMPANY, *Cross-Petitioner*,

v.

R. E. COMPTON, KENNETH L. KNOTTS, and VINCENT L. PETERSMEYER, Suing on Behalf of Themselves and all Others Similarly Situated.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

GUY W. KNIGHT,
R. N. GATTENBURG,
HUGH B. COX,
JAMES G. JOHNSON, JR.,
Attorneys for Cross-Petitioner

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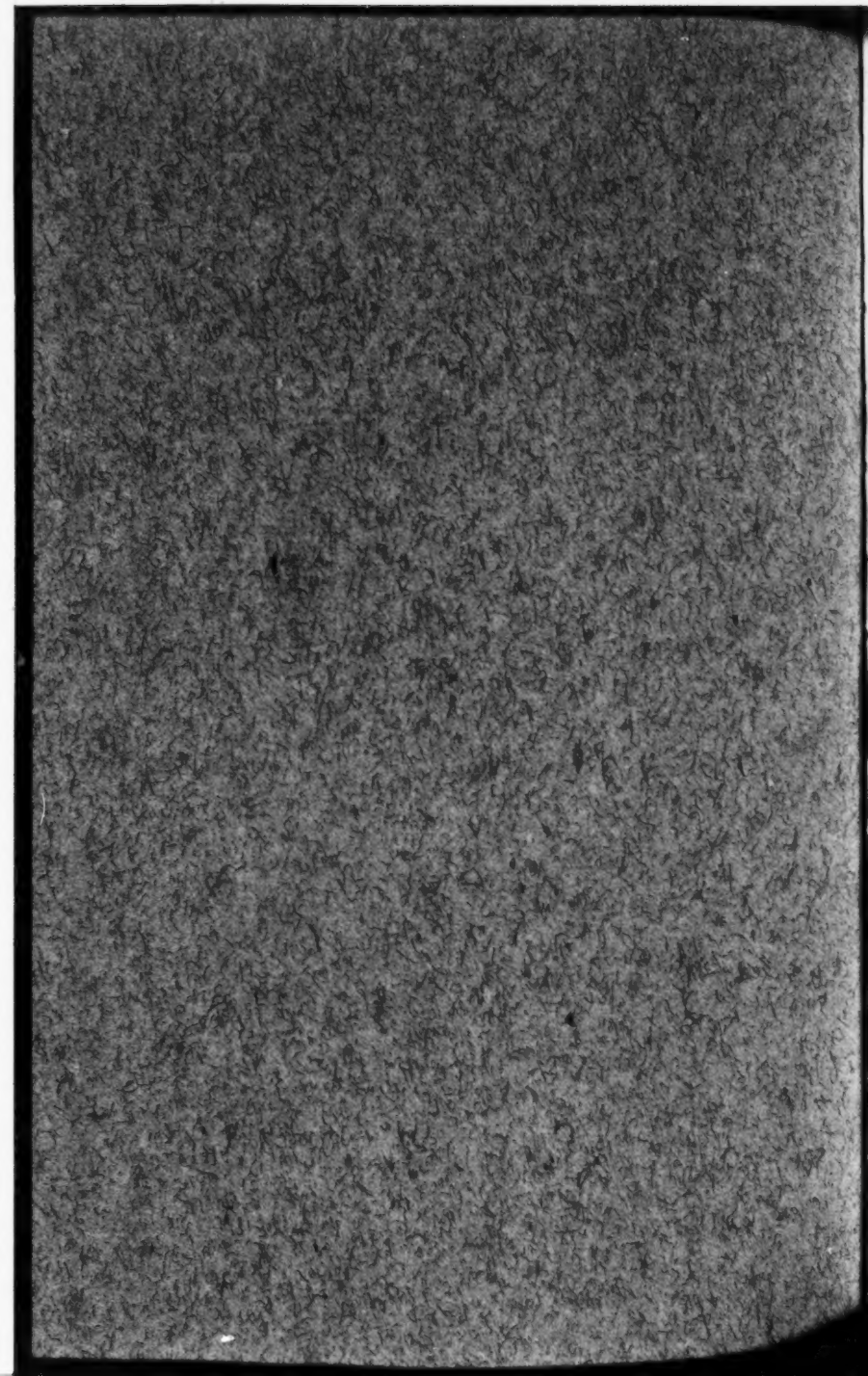

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IN THE

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October Term, 1949

No.

THE PENNSYLVANIA RAILROAD COMPANY, *Cross-Petitioner,*

v.

R. E. CONNER, KENNETH L. KNITTER, and VINCENT L. PETENBRINK, Suing on Behalf of Themselves and all Others Similarly Situated.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

The Pennsylvania Railroad Company respectfully prays that, in the event that this Court should issue a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the District of Columbia Circuit (R. 73) as requested in the Petition of R. E. Conner, Kenneth L. Knitter, and Vincent L. Petenbrink, (Case No. 575, October Term, 1949), who were the plaintiffs-appellants below, a writ of certiorari also be issued to that portion of

the said decision which sustains a part of the second cause of action in the Amended Complaint.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 65-72) is reported in 177 F (2d) 864. The opinion of the District Court (R. 60-62) is unreported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code. Time within which this Cross-Petition for Writ of Certiorari might be filed was extended by order of Mr. Chief Justice Vinson on December 29, 1949, to and including March 4, 1950 (R. 91).

Question Presented

Whether the Circuit Court of Appeals for the District of Columbia Circuit correctly held that, under the Selective Training and Service Act of 1940, the plaintiff-appellants below should presently be accorded the opportunity to transfer from passenger service to freight service with seniority as of dates which would place them ahead of the freight trainmen who entered freight service after the said plaintiff-appellants had left to enter the Armed Forces, where

(a) there was no custom and practice, and no agreement, for passenger trainmen to transfer to freight service on the basis of their relative seniority in passenger service, and,

(b) plaintiff-appellants have never requested transfer from passenger service to freight service and ask in the Amended Complaint for an opportunity now to decide whether or not so to transfer *only in the event that* their first cause of action, involving their

relative seniority position on the passenger roster, be denied.

Statutes Involved

Pertinent provisions of the Selective Training and Service Act of 1940 (50 U. S. C. § 308; c. 720, 54 Stat. 885, § 8, as amended) are set forth in the supplement to The Pennsylvania Railroad Company's Brief in Opposition to the Petition for Writ of Certiorari filed in this Court by the plaintiffs-appellants below in No. 575, October Term, 1949.

Statement

When the various plaintiffs-appellants below left to enter the Armed Forces of the United States, they were employed as passenger trainmen on the Maryland Division of the cross-petitioner, The Pennsylvania Railroad Company, with seniority as of the dates of the first entry of each of them into such passenger service. (R. 11-12, 55-59) While they were away in military service, vacancies occurred in the freight service of the Maryland Division and persons were employed to fill such vacancies. (R. 22) The record contains no evidence by affidavit or otherwise and no allegation, that any of these vacancies were filled by persons transferring from the passenger service to the freight service.

Separate seniority rosters are maintained on the Maryland Division for freight service and for passenger service. (R. 17-18) To the extent that transfers are permitted from one service to another, they are covered by Section 1-D-3 of the applicable collective bargaining agreement (R. 15), which provides as follows:

> "(a) On a seniority district where, on the effective date of this Agreement, it is the practice to employ trainmen for passenger, or freight or yard service exclusively, when additional passenger trainmen are needed the applications of freight and yard trainmen

on the said seniority district shall be given consideration, after which the applications of switch tenders on that seniority district shall be considered.

"(b) When additional freight and yard trainmen are required on a seniority district where the practice referred to in paragraph (a) is in effect, the applications of passenger trainmen shall be given consideration, after which the applications of switchtenders on that seniority district shall be considered.

"(c) Notice shall be published on bulletin boards giving the said trainmen and switchtenders reasonable time within which to file their applications."

Under the established custom and practice on the Maryland Division, whenever additional trainmen were needed in the passenger service, trainmen in the freight service were given the first opportunity, in order of their seniority, to transfer to the passenger service. (R. 60, 69) However, there was no such custom and practice for passenger trainmen to be given the opportunity, on the basis of their relative seniority in passenger service, to transfer to freight service. (R. 62, 71) Indeed, there was a steady flow of trainmen from freight service to passenger service prior to and during the war years, but there is no evidence or allegation of any flow whatsoever from passenger service to freight service. (R. 55-59.)

When the plaintiffs-appellants returned from military service, they applied for reemployment in the passenger service and were so reemployed. (R. 11-12) Subsequently, they raised objection that certain trainmen were given higher seniority to them in the passenger service and, on July 3, 1947, filed suit to compel these persons to be placed below them on the passenger trainmen's seniority roster or to be eliminated from that roster altogether, (R. 1.) On December 17, 1947, they filed an Amended Complaint in which they added for the first time a second alternative cause of action. (R. 10, 22) In connection with this second cause of action it was alleged that, in the event that the courts should decide the first cause of action against plain-

tiffs-appellants, then they should be given, under the Selective Training and Service Act, the opportunity to transfer from passenger service to freight service with greater seniority than those trainmen who entered the freight service during the period that the said plaintiffs-appellants were serving with the Armed Forces. In support of this second cause of action, it was alleged that some kind of notice should have been given to them with respect to applications being received for positions in freight service while they were in military service. (R. 22.)

On the basis of the above allegations, the plaintiffs-appellants below demand that, if the first cause of action be decided against them, the railroad be compelled to tender to them, at or sometime after the time when such decision is finally returned, an opportunity to decide whether or not to transfer from passenger service to freight service with the retroactive seniority in freight service to which they claim to be entitled. (R. 23-24) They also demand that the railroad be required to tender to them damages alleged to have been incurred by them by reason of the railroad's alleged failure to accord them the opportunity so to transfer upon their return to its employ from military service (R. 24). There is no allegation that any of the plaintiffs-appellants have ever applied for or requested transfer to the freight service.

The freight trainmen who would or might be affected if the second cause of action should be sustained have not been made parties to the present suit, although the Brotherhood of Railroad Trainmen has been made a party, as have the passenger trainmen who would or might be affected if the courts should sustain the first cause of action set forth in the Amended Complaint.

The District Court decided against the plaintiffs-appellants below on both the first cause of action and the second cause of action (R. 60-62.) The Court of Appeals sustained the decision of the District Court on the first cause of action and affirmed in part and reversed in part the lower court's

decision on the second cause of action. (R. 69, 71-72, 84) With respect to the second cause of action, the Court of Appeals held that the plaintiffs-appellants below are not entitled to damages but that, once the first cause of action is finally decided against them, they should be given the opportunity to transfer from the passenger service to the freight service with seniority ahead of trainmen entering such service while they were serving in the Armed Forces. (R. 70-72)

The plaintiffs-appellants below have filed a Petition for Writ of Certiorari addressed to that portion of the decision of the Court of Appeals which sustained the decision of the District Court (Case No. 575, October Term, 1949), and the present cross-petitioner is filing a Brief in Opposition to that petition.

Reasons for Granting the Writ

For the reasons set forth in its Brief in Opposition to the Petition for Writ of Certiorari in Case No. 575, The Pennsylvania Railroad Company, as conditional cross-petitioner here, urges that nothing in the decision of the Court of Appeals presents an issue which requires or deserves the exercise of this Court's discretionary jurisdiction and that as a result the Petition for Writ of Certiorari in Case No. 575 should be denied.

If this Court should grant certiorari addressed to the other portion of the decision of the Court of Appeals, however, it is submitted that the present conditional cross-petition should likewise be granted in order that this Court may have before it all of the issues involved in the case. It is submitted that under the facts as set forth in the foregoing statement, the Court of Appeals should not only have denied the claim for damages in connection with the second cause of action but also should have denied the claim for the opportunity to choose at some indefinite time in the future whether or not to transfer to freight service with retroactive seniority dates.

Conclusion

For the above reasons, the writ of certiorari requested in the foregoing Conditional Cross-Petition should be granted if this Court should decide to grant the writ of certiorari requested in Case No. 575, October Term, 1949.

Respectfully submitted,

GUY W. KNIGHT,
R. N. CLATTENBURG,
HUGH B. COX,
JAMES G. JOHNSON, JR.,
Attorneys for Cross-Petitioner.